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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

GENEVIEVE FOWLER, Plaintiff and Appellant, v. STOCKTON UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	C062227 (Super. Ct. No. CV034787)

While picking up her granddaughter from elementary school, plaintiff Genevieve Fowler tripped and fell after stepping on a storm drain grate in a parking lot owned by the Stockton Unified School District (the District). She sued the District on the theory that her injuries were caused by a dangerous condition of public property, but the District obtained summary judgment on the ground plaintiff could not show that its property was in a dangerous condition at the time of the injury, or that it had actual or constructive knowledge of the alleged dangerous condition of the storm drain grate.

Plaintiff now appeals from the judgment entered after the trial court granted the District's summary judgment motion. She contends there exist triable issues of fact as to whether the District had constructive notice of the dangerous condition of its property. We disagree and affirm the judgment.

FACTS AND PROCEEDINGS

One afternoon in March 2007, plaintiff arrived at a Stockton elementary school to pick up her granddaughter. It was still daylight. In the parking lot, she stepped on a storm drain and fell.

Plaintiff sued the District for premises liability, and alleged that as she was leaving her car in the parking lot, she "walked approximately four feet, where she stepped on the edge of a heavy metal grate covering a storm drain. The storm drain cover was not secure in its housing and upon pressure from plaintiff's foot, the grate/cover flipped, causing [her] to fall to the ground."

The District answered, and denied liability.

The District then moved for summary judgment (Code Civ. Proc., § 437c), arguing (as relevant to this appeal) that before plaintiff's injury it had neither actual nor constructive notice of the alleged dangerous condition of the storm drain grate within the meaning of Government Code section 835 (all further statutory references are to the Government Code unless otherwise indicated). (Code Civ. Proc., § 437c.)

In support of its motion, the District submitted the deposition testimony of three witnesses: the elementary school principal, a custodian/security employee, and a handyman/custodian.

The principal testified she inspects the parking lot regularly for broken glass and debris; the school staff members drive over the storm drain and "walk in and out on a daily basis"; she was never aware that anyone had any problems walking or driving over the storm drain, nor was she aware the storm drain cover was loose.

The school handyman/head custodian testified he has worked at the school for eight years; he inspects the school grounds every morning, including the staff parking lot, looking for "anything that looks like it might be a hazard" or pose a safety issue. He looks at the storm drains, but he does not "stomp on them" or "go lifting up lids or anything like that."

Finally, a custodian whose job it was to clean classrooms and "to check safety issues [and] security" testified he "looked around" the parking lot every day for broken glass and other hazards, and never heard any complaints that the storm drain cover was loose.

In her opposition to the motion for summary judgment, plaintiff argued the District had a duty to inspect the storm drain on a regular basis, and its failure to conduct "a physical inspection of the storm grate itself and especially the cement collar upon which the heavy metal grate rests" constituted negligence. She submitted the declaration of forensic engineer

Steve Wortman, who averred: "A parking lot is considered a walkway and sewer grates shall be stable. Exterior walkway conditions that may be considered substandard and in need of repair include conditions in which the pavement is broken, depressed, raised, undermined, slippery, uneven, or cracked to the extent that pieces may be readily removed. [¶] . . . Walking surface hardware shall be installed and maintained so as to be stable under reasonably foreseeable loading. [¶] . . . The government entity should have in place a reasonable inspection program. [¶] . . . A reasonable inspection program should consist of regular inspections, including visual and physical inspections of parking lots, sewer and storm drains and said inspections should be documented. [¶] . . . The defendant's inspection program fails to meet this criteria stated above because the defendant's inspection program is visual only and these facts assist to form my opinion."

In further support of her assertion that the District's inspection program was inadequate, plaintiff submitted that portion of the principal's deposition testimony in which she stated she learned after plaintiff's injury that "a piece of concrete that supported the grate had broken off"; until then, no maintenance had been performed on the storm drain "because we were not aware there was any maintenance needed."

In reply, the District asserted plaintiff failed to create a triable issue of fact as to whether the storm drain grate's support was an "obvious" condition, or whether the grate was in

a dangerous condition long enough that a reasonable inspection would have disclosed it.

The trial court overruled the District's objections to plaintiff's engineering expert's declaration and granted the District's motion for summary judgment. In so doing, it found the District "has made a prima facie showing that it had no actual or constructive notice of the alleged dangerous condition, that Civil Code § 846 liability is inapplicable as Plaintiff was not on the School's premises for a 'recreational purpose' as required by § 846, and there are no facts evidencing Plaintiff's claim that there was a willful failure to warn. [¶] . . . Plaintiff has failed to meet her burden of proof as required under Government Code § 835 in that she has failed to establish that the Defendant's property was in a dangerous condition at the time of the injury, or that Defendant had actual or constructive knowledge of any alleged dangerous condition. [¶] . . . There is no triable issue of material fact and Defendant is entitled to Judgment as a matter of law."

DISCUSSION

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decisions de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports.

[Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

"There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; *Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1092.)

We note that plaintiff complains under a separate heading in her appellate brief that the trial court failed to refer specifically in its order to the evidence indicating that a triable issue of material fact exists as required by Code of Civil Procedure section 437c, subdivision (g). Such a failure is harmless, however, "'since "'[i]t is the validity of the ruling which is reviewable and not the reasons therefore.'"' [Citation.]" (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1146 [trial court's failure to address cause of action on summary judgment was harmless error where

appellant failed to present evidence to raise a triable issue of fact].)

Under the Government Claims Act, "there is no common law tort liability for public entities in California; such liability is wholly statutory. [Citations.]" (*In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 688; see § 810 et seq.) Here, the applicable provisions limiting when a public entity is liable for a dangerous condition of public property appear in sections 835 and 835.2.

Section 835 provides: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (§ 835.)

Section 835.2 follows on, providing in pertinent part: "(a) A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of Section 835 if it had actual knowledge of the existence of the condition and knew or

should have known of its dangerous character. [¶] (b) A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. . . .” (§ 835.2.)

In a slip-and-fall action against a school district--analogous to the case here--our Supreme Court held that a trial court correctly applied these statutes to grant summary judgment in favor of the defendant district: “[Plaintiff’s] suit against the District is not an ordinary negligence case; it is an action under section 835. This is because a public entity is not liable for injuries except as provided by statute (§ 815) and because section 835 sets out the exclusive conditions under which a public entity is liable for injuries caused by a dangerous condition of public property. ‘[T]he intent of the [Tort Claims Act] is not to expand the rights of plaintiffs in suits against governmental entities, but to confine potential governmental liability to rigidly delineated circumstances: immunity is waived only if the various requirements of the act are satisfied.’ [Citation.]” (*Brown v. Poway Unified School Dist*. (1993) 4 Cal.4th 820, 829.)

To prevail then on summary judgment under the facts of this case, the District must show that plaintiff cannot prove it had actual or constructive notice of the defective condition of the storm drain support. (§ 835, subd. (b).) Actual knowledge is

defined as actual knowledge of the condition, plus that it "knew or should have known" that the condition was dangerous (§ 835.2, subd.(a)); constructive knowledge can be established only with proof the condition "had existed for such a period of time and was of such an obvious nature" that the District, exercising due care, should have discovered the condition and its dangerous character (§ 835.2, subd. (b)).

We agree with the trial court that the District, as the moving party on summary judgment, met its threshold burden of proving that plaintiff cannot establish it had either actual or constructive knowledge of the condition of the storm drain grate, i.e., that a piece of concrete that would otherwise have supported the storm drain grate from underneath had broken off and rendered the grate unstable in its housing. The principal and the custodians, who inspected the school parking lot daily, testified they never saw anything amiss, or otherwise suspected the storm drain cover was dangerous. School staff regularly drove and/or walked over the storm drain grate and no one ever reported anything to suggest the grate was loose.

On appeal, plaintiff contends "there are triable issues of fact as to whether [the District] had constructive notice" because it "should have discovered the dangerous condition by the use of a reasonable inspection program" and "[a]n adequate inspection program requires more than just visual inspection." This argument ignores that, under the applicable statute, plaintiff cannot defeat summary judgment on a theory of constructive notice unless she can point to substantial evidence

in the record that would support a reasonable inference "that the condition had existed for such a period of time and was of such an obvious nature" that a proper inspection should have revealed it. (§ 835.2, subd. (b).)

There was no evidence, direct or circumstantial, that the dangerous condition was obvious, nor that it had existed for any period of time prior to plaintiff's fall. Courts construing "obviousness" for the purpose of evaluating whether a public entity may be liable for failing to cure a dangerous condition have suggested the condition must be "conspicuous or notorious." (*Van Dorn v. San Francisco* (1951) 103 Cal.App.2d 714, 719 [for example, describing sunken and irregular areas in the street surface].) No evidence in this case suggests the condition was obvious: to the contrary, the evidence established that the defective concrete housing was below ground level, *underneath* the storm drain grate and thus hidden from view. Moreover, there was no evidence from which plaintiff could argue the condition had existed for sufficient period of time to have permitted the District employees to discover and remedy it. Indeed, there was no evidence submitted on summary judgment from which plaintiff could argue the condition had existed for any period of time before she fell.

At oral argument, plaintiff observed that, after the accident, an inspection of the concrete that supported the grate was worn, thus suggesting that the condition of the concrete had become such that it could lose its ability to support the drain at any time. On that basis plaintiff suggests that an

inspection of the underlying concrete support would have revealed the danger.

The difficulty with that argument is that the condition of the underlying concrete cannot reasonably be said to have been a condition that was of such an obvious nature that a proper inspection should have revealed it. The condition of the underlying and hidden concrete "lip" was not obvious from the street and parking lot level and we do not think that a "proper" inspection under the facts of this case should require the school district to periodically lift the storm drain grates in the parking lot to discover whether the underlying support retained the integrity to support the grate where there was no overt indication that the support was failing or had failed. Moreover, the argument still does not overcome the possibility that the defective concrete did not fail until the very moment plaintiff placed her weight on it. We are not inclined to require the school district to inspect the grates to the extent that it must periodically raise them and inspect the concrete below and then repair it if it appears worn in order for the school district to avoid liability.

For these reasons, we conclude the trial court did not err in granting summary judgment in favor of the District on plaintiff's complaint for premises liability.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

BLEASE, Acting P. J.

SIMS, J.